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No. 99-1379

IN THE

Supreme Court of the United States

CIRCUIT CITY STORES, INC.,
Petitioner,

v.

SAINT CLAIR ADAMS,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF *AMICUS CURIAE* OF THE NATIONAL ACADEMY OF ARBITRATORS IN SUPPORT OF THE RESPONDENT

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BRIEF *AMICUS CURIAE* OF THE NATIONAL ACADEMY OF ARBITRATORS IN SUPPORT OF THE RESPONDENT

INTEREST AND CONCERN OF THE AMICUS[1]

The National Academy of Arbitrators, founded in 1947, is a professional organization of neutrals. Candidates for membership must be elected by the Board of Governors after careful consideration of their qualifications by its membership

[1] Rule 37 statement: Counsel of record is the author of this brief. No person or entity other than the National Academy of Arbitrators has made any monetary contribution to the preparation or submission of this brief. Counsel for both parties have consented to its filing.

Committee. To be considered for membership an arbitrator must demonstrate acceptability by management and labor through substantial and current experience as an impartial arbitrator of labor-management disputes (at a bare minimum 50 cases within 5 years with a variety of parties) or, as an exception have obtained general recognition through scholarly publication or other activities as an impartial authority in labor-management relationships. The average member has been an arbitrator for 26 years. Members are prohibited from serving as advocates for either labor or management. As of May, 2000, the Academy had 624 American and Canadian members. The Academy is not (as the American Arbitration Association is) an appointing agency. It receives no funding from either employers or unions but is supported financially only by the dues and assessments paid by its members.

The Academy's principal purposes, set out in its constitution are "to establish and foster the highest standards of integrity, competence, honor and character among those engaged in the arbitration of labor-management *and employment disputes* [2] on a professional basis; to secure the acceptance of and adherence to the Code of Professional Responsibility for Arbitrators of Labor-Management Disputes . . .; to promote the study and understanding of arbitration of labor-management and employment disputes." Its function was best described by its president in 1983:

> The dominant commitment of this Academy throughout its history has been to the advancement of arbitration, not to the advancement of arbitrators. That essential ingredient of true professionalism, a keen and controlling sense of social responsibilitya sense of social responsibility for advancing desirable goals lying outside and beyond one's personal or

[2] Added in 1993.

> group interests—has motivated this Academy and its dedicated and committed leadership throughout its history.[3]

The traditional function of labor arbitration was to resolve disputes between management and labor primarily involving questions of interpretation and application of the terms of collective bargaining agreements (grievance arbitration) but also at times involving questions as to what the terms and conditions of new agreements should be (interest arbitration). Arbitration of disputes as to the application and interpretation of statutes protecting individual employees against specified forms of employment discrimination was not traditionally a function of labor arbitration. Recognizing that such arbitration has, however, become part of the American landscape the Academy amended its constitution and by-laws in 1993 to encompass study and educational activity with respect to non-union employment arbitration. Although the Academy has continued to limit its membership to those accomplished in traditional grievance arbitration, almost half of its members have arbitrated non-union employment cases.[4]

In submitting this amicus curiae brief the Academy speaks for the interests of neither the labor and trial lawyers supporting the respondent nor the employers supporting the petitioner. Our viewpoint, rather, is of those engaged as neutrals in the arbitration process who support and cherish it. Arbitration has achieved its place in American industrial life because it is a freely chosen procedure. In the unionized sector it is chosen by unions and employers as the alternative to economic conflict. In

[3] Abernethy, *The Presidential Address*, in Arbitration, Promise and Performance, Proceedings of the 36th Annual Meeting, National Academy of Arbitrators (1984) 18.

[4] M. Picher, R. Seeber & D. Lipsky, *The Arbitration Profession in Transition* 16 (2000). This work, No. 3 in the Cornell Studies in Conflict and Dispute Resolution, is a report on a comprehensive survey of the members of the National Academy.

other employment it was traditionally so chosen as a freely-negotiated alternative to litigation over potential disputes as to the negotiated terms and conditions of employment. Only since this Court's decision in *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991) has it widely become a condition of employment for the resolution of disputes as to violation of laws protecting employee rights imposed on unrepresented workers who have in fact no choice but to accept. Because most of our members believe that this practice will in the end have the effect of undermining the respect and approbation that arbitration has achieved as a voluntarily adopted alternative dispute mechanism, the Board of Governors of the Academy adopted the following policy statement on May 21, 1997:

> The National Academy of Arbitrators opposes mandatory employment arbitration as a condition of employment when it requires waiver of direct access to either a judicial or administrative forum for the pursuit of statutory rights.

The arbitration agreement in this case that the Ninth Circuit refused to enforce provides precisely for "mandatory employment arbitration as a condition of employment requiring waiver of direct access to a judicial forum for the pursuit of statutory rights." Since, in the view of most members of the Academy, such enforcement will in the end be detrimental to the arbitration process we submit this brief in support of the Ninth Circuit's decision.

SUMMARY OF ARGUMENT

Arbitration is a highly desirable form of dispute resolution only if it is freely chosen. Employee agreements to arbitrate future disputes are of two kinds. There are those that are freely negotiated as part of a contract of employment specifying the terms of that employment. Those, we believe, should be federally enforceable. The second kind are those, like that in this case, that are imposed as a condition of employment for the purpose of requiring arbitration of statutory claims. Those, we

believe, should not be. The exemption in Section 1 of the Federal Arbitration Act, if properly construed as a whole, can help to distinguish the two.

As the Ninth Circuit held, the exemption should not be limited to the contracts of those engaged in interstate transportation. But it should be limited, as it says, to contracts of workers who, as Congress has declared, are "helpless to exercise actual liberty of contract." Contracts of executives and other management employees are not within the exemption. Properly construed, the exemption does not apply to ad hoc agreements by workers to arbitrate existing disputes or to agreements that give workers an option to arbitrate future disputes when they arise. Where the exemption applies the enforceability of workers' agreements to arbitrate claims of violation of state law should be left to the states.

The Academy supports arbitration when it is freely and knowingly agreed to. The exemption in Section 1 of the FAA if properly construed can serve to enhance arbitration while avoiding an abuse detrimental to the process.

ARGUMENT

Introduction

Since this Court's *Gilmer* decision millions of Americans have become parties to agreements to arbitrate their disputes with their employers. The U.S. General Accounting Office has estimated that by 1997 19% of employers utilized arbitration to resolve employment disputes.[5] This enormous growth in the volume of arbitration agreements, however, includes vastly different kinds of agreements. On the one hand there are agreements such as that involved in *Asplundh Tree Expert Co. v. Bates*, 71 F.3rd 592 (6th Cir. 1995). That case arose from a dispute as to whether the corporation that had employed Bates as a

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[5] U.S. General Accounting Office, *Alternate Dispute Resolution: Employers' Experiences with ADR in the Workplace, GAO/GGO-97-157*, 2 (1997).

chief executive officer was required to pay him the salary, fringe benefits and costs specified in his negotiated employment agreement containing an arbitration provision. As noted in the amicus brief of the American Arbitration Association, fully half of the employment arbitrations filed with it are of this kind, resulting "from individual employment contracts that contain a *negotiated* arbitration clause." [6] (Emphasis added.) The arbitration "agreement" in this case, on the other hand, was not negotiated. It was required to be executed as a condition of obtaining employment. It explicitly gives the employee no right to anything — no wages, no benefits, no limitation on discharge. Its only purpose is to require arbitration of claims of violation of law.[7] The two are as different as day and night. But they are argued by petitioner and its supporting amici to be equally enforceable under the Federal Arbitration Act.

The Academy believes, with the AAA, that provisions of the Bates type should be enforced as a matter of federal law; they are freely negotiated, consensual, agreements. We believe that agreements of the kind represented by this case should not be. Unlike the AAA, which urges reversal of the Ninth Circuit but, with good reason,[8] does not explicitly support the petitioner, we believe that this result can be achieved by construing the commerce requirement in the exemption in Section 1 in accordance with the opinion of the Ninth Circuit but paying strict attention to the other limitations in the exemption.

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[6] Brief Amicus Curiae of the American Arbitration Association In Support of Reversal 10.

[7] J.A. 31

[8] The Circuit City Stores agreement in this case requires the employee to pay half the costs of the arbitration and, potentially, Circuit City's costs if it prevails in the arbitration. (J.A. 34) It puts limits on the back pay, front pay and punitive damages that an arbitrator can award that are not applicable in court. (J.A. 35) Under its rules the AAA would decline to administer a case under that agreement. Brief of the AAA, *supra n. 6*, 7.

I. THE NINTH CIRCUIT'S READING OF THE COMMERCE LIMITATION IN THE EXEMPTION MAKES SENSE

The exemption in Section 1 excludes from the Act "contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce." The conflict between the Ninth and the other Circuits concerns the interpretation to be given to the commerce limitation. The debate is about whether "engaged in" commerce in the exemption should be read the same as or more narrowly than "involving" commerce in the coverage provision in Section 2. We can add little to that debate. Suffice it to say that attempting to read back into the Congressional mind the distinction between the two as adumbrated in the decisions of this Court in other contexts verges on scholasticism. The parties, and other amici, we are sure, will worry to death the subtleties of the language involved.

The language is certainly ambiguous. On the one hand, "engaged in" commerce can be read, as all the Circuits except the Ninth have held, to mean participating or taking part in commerce as distinguished from "involving," i.e. affecting commerce. On the other hand, the difference more probably is purely syntactical. "Engaged" is used in describing persons while "involving" is used in describing transactions; one could not say that a person was "involving" commerce or that a transaction was "engaged in" commerce.

Despite the ambiguity of the commerce requirement, three things are clear. First, the commerce requirement in the exemption is related to the employee, not the employer. Under the restrictive, transportation, view of that requirement an interstate truck driver's agreement would be exempt but that of other employees of the same employer would not be.[9] Second, and more

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[9] *See*, e.g. *BWI Companies v. Beck*, 910 S.W. 2d 620 (Tex. App. 1995). This was also the case under the Fair Labor Standards Act until it was

important, there is no indication that the Congress that passed the Act paid any attention whatsoever to the supposed difference in language. What is plain from the history of the exemption, as carefully described by Profession Finkin,[10] is that it was hastily drawn and adopted without any discussion or attempt at definition with a simple objective: getting rid of the objection of the labor movement to a statute that the American Bar Association and the administration, through Secretary Hoover, wanted passed to satisfy commercial needs. Finally, the exemption must be interpreted as part of a statute that has been transformed by the decisions of this Court, over vigorous dissent, from one governing procedures in the federal courts to a substantive statute overriding state law.[11]

Under these circumstances the Court should not make a fortress of a dictionary[12] but rather attempt to make sense of the exemption. That requires consideration of the exemption as a whole. The commerce limitation in it made no sense in 1925, and makes no sense today, if it is read to exclude arbitration agreements signed by interstate truck drivers from the FAA but

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amended in 1961 to make coverage depend on the relationship to commerce of the employing "enterprise." See *Brennan v. Arnheim & Neely, Inc.*, 410 U.S. 512, 516 (1973).

[10] Matthew W. Finkin, *"Workers Contracts" Under the United States Arbitration Act: An Essay in Historical Clarification*, 17 Berkeley J. Emp. Lab. L. 282 (1996) (hereinafter Finkin), Matthew W. Finkin, *Employment Contracts Under the FAA — Reconsidered*, 48 Lab. Law. J. 329 (1997).

[11] *Southland Corp. v. Keating*, 465 U.S. 1 (1984).

[12] As Judge Learned Hand put it in *Cabell v. Markham*, 148 F.2d 737, 739 (2d Cir. 1945), *aff'd* 326 U.S. 404 (1945): "Of course it is true that the words used even in their literal sense, are the primary, and ordinarily the most reliable, source of interpreting the meaning of any writing: be it a statute, a contract, or anything else. But it is one of the surest index of a mature and developed jurisprudence not to make a fortress of a dictionary; but to remember that statutes always have some purpose or object to accomplish, whose sympathetic and imagination discovery is the surest guide to their meaning."

to include local drivers working for the same employer and working out of the same terminal. On the other hand, a broad reading of the commerce requirement makes no sense either if the other limitations of the exemption are ignored and all agreements to arbitrate by employees subject to Congressional power are exempt from the FAA. Our contribution will be an attempt to provide a sensible reading of the entire exemption, one that will be consistent with a policy supportive of arbitration but antithetical to its abuse. That requires, we believe, focus on an issue simply overlooked in the linguistic debate about the commerce limitation: the language of the other terms of the Section 1 exemption. Properly interpreted those terms will, we believe, both make sense of the exemption and help to distinguish between the two different kinds of arbitration agreement we have described.

II. SECTION 1 DOES NOT REQUIRE THE EXEMPTION OF ALL CONTRACTS OF EMPLOYMENT

Astonishingly, the petitioner and the amici supporting it, as well as the Ninth Circuit and Professor Finkin, say that if the commerce requirement in the exemption in Section 1 is met all contracts of employment are exempted by the section.[13] This is astonishing because the exemption by its explicit terms does not so apply. Section 1 does not exempt all contracts of employment but only those entered into by certain kinds of employees, those specifically named *and* members of the class of "workers." The term "workers" is not defined but it has a definite meaning in common parlance. It excludes executives and, indeed, all management employees. Webster's Third New International Dictionary says that "worker" is synonymous with laborer or toiler, "one who is employed especially at manual or industrial labor

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[13] Finkin asserts broadly that the Act "exempts contracts of employment, all contracts of employment over which Congress had constitutional authority." Finkin, *supra note 10, at 298*.

for a wage" or "a member of the working class."[14] The American Heritage Dictionary defines worker as one who "does manual or industrial labor" or a "member of the working class."[15] Thus defined, the term clearly excludes management employees. When Karl Marx called upon the workers of the world to unite he was not speaking to management. The United Steel *Workers*, the United Automobile *Workers*, the United Mine *Workers* are organizations of working men and women not management. When, in the hearings on the Act, the representative of the American Bar Association suggested the exemption because the Act was not intended to refer to "labor disputes"[16] he was referring to disputes between management and workers, not executives. The opposition to the FAA which gave rise to the exemption came from the American Federation of Labor, an organization representing workers, not management.

Concededly there are alternative definitions that would include all employees. But such a reading would, as the Seventh Circuit has said, "give the exclusion a breathtaking scope. It would mean that an arbitration clause in an employment contract between a giant multi-national corporation and its chief executive officer would, although plausibly 'involving' interstate commerce within the meaning of Section 2, not be enforceable in federal court." [17] The Seventh Circuit concluded that to avoid that result the exemption should be read to cover only those involved in transportation. More sensibly it should be

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[14] Webster's Third New International Dictionary (1981) 2364.

[15] The American Heritage Dictionary of the English Language (3d ed. 1996) 2057.

[16] "It is not intended that this shall be an act referring to labor disputes, at all. It is purely an act to give the merchants the right or the privilege of sitting down and agreeing with each other as to what their damages are, if they want to do it." W.H. Pratt testimony reported at Finkin, *supra* n. 10, at 285.

[17] *Pryner v. Tractor Supply Co.*, 109 F. 3d 354, 358, *cert denied*, 522 U.S. 912 (1957).

read, as it says, to apply to workers in the sense we have described. So reading it would exclude executives and other management employees.[18]

The only appellate decision that we know of agrees. In *Bernhardt v. Polygraphic Co.*, 218 F.2d 948 (2d Cir. 1955) the Second Circuit held that the arbitration provision in the contract of employment of a superintendent of a plant was enforceable under the FAA. After holding that the provision for a stay pending arbitration in Section 3 of the Act was independent of the commerce requirement in Section 2, the court went on to hold that the exemption in Section 1 was inapplicable. The reason: "Plaintiff was not hired as a 'worker' but as a plant superintendent, at a salary of $15,000 a year, with managerial duties fundamentally different from those of 'workers.'" [19]

The exclusion from the exemption of management employees' contracts, is significant. It helps to draw a line between the two kinds of arbitration agreements we have described. Most American workers do not enter into individual negotia-

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[18] Careful definition of "workers" is not required in this case. The plaintiff, Saint Clair Adams, is clearly a member of the working class. If definition is needed in other cases recourse can be had to decisions under the National Labor Relations Act. That Act contained a broad definition of employee but the National Labor Relations Board and this Court concluded that given the structure of the statute it made no sense to include managerial employees in the protections given to employees by the Act, and there is a substantial body of authority delineating the distinction. See *NLRB v. Bell Aerospace Co.*, 416 U.S. 267 (1974). The exemption should include employees held to be protected by the NLRA under *Packard Motor Co. v. NLRB*, 330 U.S. 485 (1947) prior to the 1947 exclusion of supervisors since foremen are not normally able to negotiate the terms of their employment.

[19] 218 F.2d at 951-952. This Court reversed on the commerce question, holding that in the absence of an allegation that the superintendent was engaged in commerce the FAA was inapplicable and state law governed. 355 U.S. 198 (1956). The Court did not, therefore, address the exemption question.

tions as to the terms and conditions of their employment. Indeed, the only historical parallel to the type of individual agreement involved in this case is the "yellow dog" contract: An agreement that specified nothing about wages or hours or provided any protection against discharge but only contained one term: the agreement not to join a union. In this sense the arbitration agreement involved in this case is the "yellow dog" contract of the 90's. Congress, in making yellow dog contracts unenforceable, declared in Section 2 of the Norris La Guardia Act that "the individual unorganized *worker* is commonly helpless to exercise actual liberty of contract and to protect his freedom of labor."[20] (Emphasis added.) Just so, and for the same reason, seven years earlier it exempted workers' contracts, and only workers contracts, from the FAA.

Unlike workers, executives and other management employees typically do negotiate employment contracts specifying a salary and a term, as well as other matters, and they may include an arbitration provision. Paying attention to the requirement of Section 1 of the exemption that the excluded employment contract be a contract by a worker, therefore, serves as a method for distinguishing the arbitration agreements of those who are "helpless to exercise actual liberty of contract" from the agreement of those, who, by and large, are not.[21]

The Ninth Circuit did not address the question of whether the respondent in this case was a "worker." But the record in this case clearly shows that he was. He was a clerk in a retail store. He was not the kind of employee involved in the *Gilmer* case. Robert Gilmer was not a "worker" but a Manager of Financial

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[20] 29 U.S.C. § 102

[21] The distinction is, we concede, not perfect. Many lower level managerial employees may have little real choice as to whether to agrree to arbitration and some workers, particularly in the entertainment industry, have real negotiating power. The distinction nevertheless substantially accomplishes the goal. The best is the enemy of good, as Voltaire said.

Services. He was, as the Court took pains to describe him, an "experienced business man." [22] He was, in short, a management employee and as such not within the exemption of Section 1 of the FAA even though engaged in an industry affecting commerce. If we ignore for the moment what the Court itself ignored — that if he was to function as a broker federal law required him to register with the New York Stock Exchange and the Exchange required him to agree to arbitration, a situation which no longer exists[23] — he was the kind of employee who was in a position to refuse to agree to waive his right to judicial enforcement of his statutory rights. Although he was engaged in an industry affecting commerce, he was not a "worker" and therefore not within the exemption.

III. THE EXEMPTION APPLIES ONLY TO CONTRACTS OF EMPLOYMENT AND DOES NOT EXCLUDE FROM ENFORCEMENT ALL WORKERS' AGREEMENTS TO ARBITRATE

We agree with the Ninth Circuit that the agreement in this case is a contract of employment because it was imposed as a condition of gaining employment and dealt with employment matters, a question in any event not open for argument given the limited grant of certiorari. But it is important to emphasize that if the exemption to Section 1 is construed as we suggest it would apply only to the agreements to arbitrate contained in contracts of employment. Workers' agreements to arbitrate are not exempt from enforcement by Section 1 unless they are contained in a contract of employment. Certainly, a worker's agreement to arbitrate a dispute that has already arisen is not exempted. It is an agreement to arbitrate a dispute, not a contract of employment. Nor, in our view, would even a mandatory con-

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[22] 500 U.S. at 33.

[23] See the brief amicus curiae of the Securities Industry Association in support of petitioner at pp. 16-18.

tract of employment that provided an alternative dispute mechanism for future disputes and provided for arbitration at the option of the worker be exempt. In such a case the agreement to arbitrate would be the exercise of the option. The contract of employment embodying the option would not in itself be the effective arbitration agreement; the agreement to arbitrate is not formed until the employee accepts the option's continuing offer.

Finally, it is not at all clear that a collective bargaining agreement is a contract of employment. That issue is not before the court but the Ninth Circuit in *Craft v. Campbell Soup Co.*, 177 F.3rd 1083, in which it set out the reasoning on which the judgment in this case rests, assumed without discussion that the collective agreement in that case constituted a contract of employment bringing the exemption in Section 1 into play. That assumption is not necessarily correct. As this Court said in *J.I. Case Co. v. National Relations Board*, 321 U.S. 332, 334 (1944):

> Collective bargaining between employer and the representatives of a unit, usually a union, results in an accord as to the terms which will govern hiring and work and pay in that unit. The result is not, however, a contract of employment except in rare cases; no one has a job by reason of it and no obligation to an individual ordinarily comes into existence from it alone. . . .[24]

IV. THE NINTH CIRCUIT'S DECISION REMITS THE ENFORCEMENT QUESTION IN THIS CASE TO THE CALIFORNIA COURTS

The procedural posture of this case illustrates the limitations of the Ninth Circuit's decision. Respondent Adams, a California resident, filed suit in a California state court claiming a violation of a California statute, the California Fair Employment and Housing Act. The defendants were California residents and Circuit City Stores, Inc. an out-of-state corporation. The defendant corporation did not attempt to require arbitration of the state law claim in the California court. Nor did it remove the suit to federal court.[25] The suit remains pending in the California court. Instead, relying on diversity of citizenship, it initiated this case, a separate proceeding against Adams under Section 4 of the FAA to require him to arbitrate his state law claim and to enjoin the state court proceeding pending arbitration.

[24] 321 U.S. 332, 334-335 (1944).

This case is similar in some respect to *Bernhardt v. Polygraphic Co.*, 350 U.S. 198 (1955). There the question was whether the FAA was inapplicable because of the absence of an allegation of interstate commerce; here it is whether it is inapplicable because of the exemption. When this Court found the Act inapplicable in *Bernhardt* it went on to hold that *Erie R.R. v. Tompkins, 304 U.S. 64 (1938)* required that state law governed as to the enforceability of a pre-dispute arbitration agreement and concluded that under Vermont law the arbitration agreement was unenforceable.

In this case reference to state law would produce the same result. Under California law Circuit City Stores' particular arbitration agreement is unenforceable as an unconscionable contract of adhesion. *Ramirez v. Circuit City Stores, Inc.*, 90 Cal Rptr. 2d 916 (Ct. App. 1999) *rev. deferred*, 94 Cal Rptr. 2d 1, 995 P. 2d 137 (Sup. Ct. 2000); *Armendariz v. Foundation Health Psychcare*, 83 FEPC Cases (BNA) 1172, __ P. 2d. __ (Ca. 2000). But, unlike *Bernhardt*, this Court cannot rest its decision on state law. If the Ninth Circuit's decision as to the scope of the exemption is sustained Section 4 of the FAA is inapplicable and there is no basis for this proceeding.[26] The facts

[25] It could not in the absence of complete diversity in the California suit.

[26] If, on the other hand, the Ninth Circuit is reversed then a decision must be made as to the enforceability of Circuit City Stores' arbitration agreement under California law.

of this case thus vividly demonstrate that the decision of the Ninth Circuit does not, in and of itself, render all workers agreements to arbitrate state statutory claims unenforceable; it simply leaves the question open for decision by the California courts.

This is an entirely justifiable result. There is no reason why federal law should intervene to prevent the California courts from determining whether a California agreement to arbitrate should preclude judicial enforcement of a California statute. True, this court in *Southland Corp v. Keating*, 465 U.S. 1 (1984), over vigorous dissent, found that the Federal Arbitration Act had precisely this effect. But that case, as well as *Doctor's Associates, Inc. v. Casarotto*, 517 U.S. 681 (1996), did not involve the labor exemption. If the exemption applies state law will determine if a worker's pre-dispute agreement to arbitrate can bar judicial enforcement of his state law claim. Only in suits brought to enforce federal law brought in, or removed to, federal court will the Ninth Circuit's reading of the exemption result in non-enforcement.

CONCLUSION

The National Academy of Arbitrators supports arbitration as a voluntary method of resolving disputes, whether those disputes be as to the meaning and application of the terms of a collective agreement or of a statute. But arbitration is desirable, we believe, only if it is freely and knowingly agreed to. This is particularly true when statutory protection of workers' rights is involved. This Court made a major advance in that direction with respect to unionized workers in *Wright v. Universal Maritime Service, Inc.*, 525 U.S. 70 (1998). It held, as the Academy urged in its amicus brief in that case, that a collective agreement should not be construed as waiving a worker's right to a judicial forum for claims of employment discrimination unless that waiver was clear and unmistakable. The Court can now provide the same protection for unrepresented workers by accepting the

Ninth Circuit's reading of the commerce requirement in the exemption in Section 1 of the FAA. Such a reading makes sense of the exemption, is in accord with its genesis, and would support rather than diminish the status of arbitration as an alternative dispute mechanism.

We agree that alternative disputes resolution programs providing in-house informal procedures for resolving disputes, including those involving statutory rights, are desirable for both management and workers. Arbitration as the final step in such procedures is certainly appropriate. But, we submit, unilaterally foisting it upon workers who have no real option to accept or reject it is good neither for workers nor the arbitration process. The exemption in Section 1 of the Federal Arbitration Act should therefore be construed as we have suggested and the judgement of the Ninth Circuit should be affirmed.

Respectfully submitted,

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